Graphic Communications International Union, Local 508M, O-K-I, AFL–CIO *and* Jos. Berning Printing Company and Cincinnati Typographical Union, Local 3/CWA 14519, AFL–CIO. Case 9–CD–485–1

July 21, 2000

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

The charge in this Section 10(k) proceeding was filed June 3, 1999, by the Employer, Jos. Berning Printing Company, alleging that the Respondent, Graphic Communications International Union, Local 508 O-K-I, AFL–CIO (GCIU or Local 508M), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Cincinnati Typographical Union, Local 3/CWA 14519, AFL–CIO (CTU). The hearing was held June 21, 1999, before Hearing Officer Theresa Donnelly.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer, an Ohio corporation, is engaged in offset and lithographic printing at its facility in Cincinnati, Ohio. In the past 12 months the Employer has sold and shipped goods valued in excess of $50,000 from its Cincinnati, Ohio facility to points outside the State of Ohio. In the past year the Employer derived gross revenues in excess of $500,000. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that GCIU and CTU are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer is engaged in the commercial printing business. The Employer currently employs 18 individuals. Twelve of them are employees who are represented by two labor organizations, the Cincinnati Typographical Union and the Graphic Communications International Union, Local 508M. Eleven are represented by the GCIU and one is represented by the CTU. The Employer is party to collective-bargaining agreements with both Local 508M and the CTU. The Employer has performed the disputed prepress preparatory stripping work since 1970. Prior to 1993, the work was exclusively performed by Richard and Michael Berning, the Employer's owners. They were, and are, active members of the CTU.[1] Currently two employees perform the disputed work. They are Mark Trenn, a stripper for the Employer since 1993 and a member of the CTU, and Tom Giaccio, a member of Local 508M.

Giaccio was hired on November 10, 1997, and subsequently became a member of the GCIU.[2] On learning that an employee represented by the GCIU was performing the disputed work, the CTU filed a grievance. A grievance meeting ensued and the parties deadlocked. The president of the CTU then informed the Employer that he would pursue the grievance to arbitration. On May 3, Local 508M informed the Employer, in writing, of its intent to strike if the grievance resulted in a change of the status quo. The Employer then filed this charge, and the CTU agreed to hold the arbitration in abeyance pending the result of the 10(k) hearing.

B. Work in Dispute

The disputed work involves "the assignment of prepress preparatory work involving the stripping of materials for camera work" at the Jos. Berning Printing Company.[3] This involves taking a picture of the image to be printed. This picture, or negative, is taken to a light table, then stripped into a masking form. The masking form holds the negative in place. The stripped negative and a light sensitive plate are then vacuumed together and a light is shot through the negative burning the negative onto the printing plate.

C. Contentions of the Parties

The Employer contends that employees represented by Local 508M should be awarded the stripping work because its collective-bargaining agreement clearly provides it jurisdiction over such work and that it is "the stronger, better union." In its brief the Employer also argued that the GCIU's contract specifically covered the

[1] Both Michael and Richard Berning continue to be dues paying members of the CTU although neither have performed stripping work in years.

[2] Tom Giaccio was hired and subsequently placed in the GCIU unit by the Employer. On direct examination the Employer's attorney questioned Michael Berning, the Employer's president, in pertinent part:

> Q. In the labor contracts, what factors do you consider in awarding the work to the GCIU when you hired Tom Giaccio approximately a year and a half ago?
>
> A. When Tom was hired, I looked at both contracts . . . . And I just thought that it was a—it was a better situation for Tom Giaccio to be in a stronger, better union with the rest of the people in the shop.

Furthermore on cross-examination, the attorney for the CTU asked Michael Berning:

> Q. So wasn't he (Richard Berning past President of the Employer) the *one who had to make the decision on what union Mr. Giaccio would be assigned to?* [Emphasis added.]
>
> A. *We—did it as a joint venture, together, correct*. [Emphasis added.]

[3] In reality, the dispute concerns only the stripping work performed by Giaccio. No one contests the stripping work done by Trenn.

disputed work while the CTU's contract referred to stripping associated with composing or typographical work which the Employer no longer performs.

Local 508M is in agreement with the Employer. Local 508M also claims that the GCIU traditionally represents employees performing the disputed task in the Cincinnati area and nationwide.

The CTU contends that its collective-bargaining agreement provides employees it represents with exclusive jurisdiction over the disputed work, that it is the only Union to have represented strippers at Jos. Berning Company, and that in the Cincinnati area it has a history of representing those employees.

D. Applicability of the Statute

Before the National Labor Relations Board may proceed with a determination of the dispute pursuant to Section 10(k), it must be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated and the parties have not agreed on a method for the voluntary settlement of their dispute.

On April 16, 1999, the CTU filed a grievance asserting that the Employer violated the terms of the collective-bargaining agreement by assigning the performance of stripping work to Tom Giaccio. Subsequently, at the grievance meeting, the parties deadlocked and the CTU informed the Employer it intended to proceed to arbitration. On April 23, 1999, the Employer notified the GCIU of the CTU's intent to proceed to arbitration. On May 3, 1999, the GCIU informed the Employer that if arbitration resulted in a change in the status quo, the GCIU would strike. The parties stipulated that there is no method of resolving the dispute that would be binding on all the parties.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.[4]

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting),* 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction),* 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Board certifications and collective-bargaining agreements

Both the GCIU and the CTU have collective-bargaining agreements with the Employer containing language that, on its face, arguably entitles employees they represent to perform the disputed work. However, neither union is certified by the Board as the representative of the two employees who perform such work. Section 4(a) of the CTU's collective-bargaining agreement states in relevant part that "the Employer shall not make any other contract covering the work mentioned above especially no contract using the word 'stripping' to cover any of the work as above mentioned." The language in section 3(2) of the GCIU's collective-bargaining agreement provides that, "the Employer hereby agrees not to sign an agreement with any other organization claiming jurisdiction over the operation of any devices connected with offset platemaking, camera operation, all darkroom work, stripping opaquing and platemaking."

In these circumstances, we find that the collective-bargaining agreements do not favor employees represented by either union.

2. Employer preference

At the hearing and on brief, the Employer states that its preference is to have the work in dispute performed by an employee represented by the GCIU. However, as also noted, the Employer's stated preference is not based on any of the traditional factors, such as skills or efficiency of operations, that the Board often uses in making an award of the disputed work.[5] To the contrary, the Em-

[4] Contrary to our dissenting colleague, we conclude that this dispute is jurisdictional in nature rather than representational. We further disagree with our colleague's view that since no one is disputing Mark Trenn's right to perform the work, the dispute is solely about Giaccio's unit placement. The CTU stated in its grievance that Giaccio was placed in the "wrong union." If this were all that was said and argued, we might agree with our colleague. However, the CTU subsequently clarified what it sought. On brief to the Board, the CTU makes clear that what it seeks is not merely Giaccio's membership in the CTU. Rather, as stated in the conclusional statement in their posthearing brief, the "CTU respectfully requests that the Board assign the prepress preparatory work involving the stripping of material for camera work to the CTU." Furthermore, CTU President Jim Plogmann testified on direct examination that after hearing that another employee (Giaccio) was working with Trenn, Plogmann immediately sent a letter to Jos. Berning Printing Company requesting information about Giaccio "[b]ecause it appeared to me, from what Mark had told me that *he (Giaccio) was doing our work*." (Emphasis added.) Thus the CTU claimed the right for the employees it represents to perform the work and so requests the Board to legitimize that claim. This is underscored by the fact that no party to the dispute argued that this was representational and that the notice be quashed. All parties to the dispute viewed this as a jurisdictional matter. Contrary to the dissent, this dispute, unlike that in *Dearborn Village*, 331 NLRB No. 27 (2000), is not merely over what union will represent the employee (Giaccio) currently performing the work. Rather, CTU has confirmed that it seeks the work in dispute for an employee it would represent, which may not be Giaccio. Thus, we do not have a representational dispute but clearly a jurisdictional dispute.

[5] See *Jack Ebert & Co.*, 226 NLRB 242 (1976) (an employer's assignment of disputed work will typically be based on the following factors: industry practice, relative skills involved, the economy and efficiency of operation, and safety factors). See also *Teamsters Local*

ployer admits that its preference is based on its unilateral decision to place a newly hired employee in what it perceived to be a "stronger, better union."

The Board generally gives considerable weight to an employer's uncoerced preference in making work assignment awards.[6] However, this considerable weight is accorded because an employer's preference is typically based on legitimate, traditional factors relevant to awarding work in dispute.[7] The Employer's purported concern that a new employee belong to a "stronger, better union" cannot serve as a basis for the Employer's preference. Thus, we find under these unique circumstances that the Employer's stated preference does not favor awarding the disputed work to the employees represented by the GCIU.

3. Past practice

From 1970 until 1997, only members of the CTU performed the stripping work. Although two of these members were employers, a third one (Trenn) was a statutory employee. No stripper was a member of the GCIU. The past practice changed in 1997 when the Employer unilaterally assigned stripping work to Giaccio. This assignment was disputed by the CTU as soon as it learned about it. That assignment is the dispute in this case. In these circumstances, the past practice favors the employees represented by the CTU.

4. Area and industry practice

The GCIU and the CTU both provided evidence that, in the Cincinnati area, each union represents employees that perform stripping work. Local 508M represents a greater number of bargaining units performing stripping work and it also represents some 1500 employees compared with the 100 employees the CTU represents. Furthermore, Local 508M's geographical jurisdiction is considerably broader than that of the CTU. There was no substantiated testimony as to either union's jurisdiction outside of the Cincinnati area. Since both unions perform the disputed work in the Cincinnati area, this factor favors neither group of employees.

5. Relative skills and training

Neither group of employees has an advantage with regard to skills or training. Both unions provide a four-year apprenticeship but neither provides skill-training programs. Further, Michael Berning stated that neither union's members possess greater skills in performing stripping work. This factor does not favor the employees represented by either union.

6. Economy and efficiency of operations

Michael Berning testified that it was his belief that having all employees under one union would provide better communication and greater efficiency.[8] However, Michael Berning admitted that neither Union's employees works more efficiently or economically than the other, nor would production be impacted by awarding the disputed work to one group of employees rather than the other. This factor favors neither group of employees.

7. Joint board determinations

At S. Rosenthal & Company in the early 1990s there was a dispute in the Cincinnati area regarding jurisdiction over preparatory work between the CTU and what is now Local 508M. The Board awarded the work to employees represented by the GCIU. It is unclear whether this preparatory work included stripping. Since it cannot be determined what work was awarded this factor does not favor the employees represented by either union.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Cincinnati Typographical Union, Local 3/CWA 14519, AFL–CIO are entitled to perform the work in dispute. We reach this conclusion relying solely on the Employer's past practice. As noted earlier, under the unusual circumstances of this case, we find that the Employer's stated preference insufficient to outweigh the Employer's past practice. In making this determination, we award the work to the employees represented by Cincinnati Typographical Union, Local 3/CWA 14519, AFL–CIO, not to that union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Jos. Berning Printing Company represented by the Cincinnati Typographical Union, Local 3/CWA 14519, AFL–CIO are entitled to perform prepress preparatory work involving the stripping of material for camera work at the Cincinnati, Ohio facility.

2. Graphic Communications International Union, Local 508M, O-K-I, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Jos. Berning Printing Company to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Graphic Communications International Union, Local 508M, O-K-I, AFL–CIO shall notify the Regional Director for Region 9 in writing

610 (Valley Plate Glass Co.), 196 NLRB 1140 (1972), and *Iron Workers Local 380*, 267 NLRB 284 fn. 8 (1983).

[6] See, e.g., *Holt Cargo*, 309 NLRB 377, 381 (1992).

[7] See, e.g., *Hudson General Corp.*, 326 NLRB 62 (1998). In *Hudson* to determine the weight to be accorded to employer preference, the Board examined whether that preference was supported by other traditional factors relevant to making an award in a jurisdictional dispute. Though the majority and dissent disagreed on whether other traditional factors supported the employer preference, all agreed that the relevant inquiry involved reviewing traditional factors.

[8] On cross-examination Michael Berning, president of the Employer, admitted that the Employer had no communications problems between its CTU represented strippers and its employees represented by the GCIU.

whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

MEMBER HURTGEN, dissenting.

I conclude that this case presents a representational issue rather than a jurisdictional dispute. I would therefore quash the 10(k) notice.

Until 1997, the Employer's stripping work had been performed by an employee (Mark Trenn) represented by the Communications Typographical Union, Local 3/CWA 14519, AFL–CIO (CTU). In 1997, the Employer hired a new employee (Tom Giaccio) and placed him in a unit represented by the Graphic Communications International Union, Local 508M, AFL–CIO (GCIU). On learning of this, CTU filed a grievance. Significantly, the grievance claims that Giaccio was placed *in the wrong bargaining unit*. GCIU threatened to strike if the grievance changed the status quo.

Based on the above, it is clear that the dispute is about the unit placement of Giaccio. Thus, the dispute is representational, rather than jurisdictional. That is, in a jurisdictional dispute, the parties have a dispute as to which group of employees should be assigned the work. By contrast, in a representational dispute, the parties have a dispute as to the unit in which a given employee or employees are to be placed. In the instant case, the dispute is about the unit in which Giaccio is placed. Neither the GCIU nor CTU is quarreling about the general work of stripping. For example, both are content to leave Trenn in his stripping job. The CTU never requested that Giaccio be removed. CTU requested only that the Board place Giaccio in the CTU unit. Thus, the parties simply disagree about the unit in which Giaccio is to be placed.

This case is analogous to *Dearborn Village,* 331 NLRB No. 27 (2000), where the Board determined that a dispute was representational, rather than jurisdictional. In *Dearborn Village*, three employees were hired to shingle roofs. Subsequent to their hire, two unions disputed which union would represent the employees currently performing the shingling work. The Board held that since the dispute did not involve the assignment of work to one particular group of employees over another, the dispute was not jurisdictional within the meaning of Section 8(b)(4)(D). In other words, the dispute in *Dearborn Village,* as in the instant case, was over which union would represent particular employee(s).

In support of their view that the dispute is jurisdictional, my colleagues point to a statement in a post-hearing brief to the Board. Apart from the fact that statements in a brief are not evidence, I note that the statement itself does not state that the work should be *taken away from Giaccio and given to employees represented by CTU*. Rather, the statement says only that the work should be given to the CTU itself. This language is representational, not jurisdictional.

My colleagues also note that the CTU complained that Giaccio was "doing our work." However, this was simply a way of saying that the work was the unit work of CTU. Thus, CTU wants the work in its unit. As the majority concedes, this can be accomplished with or without Giaccio in the job.

Finally, my colleagues observe that no party seeks to quash the notice. However, before the Board can decide the merits of a jurisdictional dispute, the Board must first decide that there is reasonable cause to believe that there is such a dispute. See *Dearborn Village*, supra.

Accordingly, inasmuch as this case does not present a jurisdictional dispute, I would quash the notice.